No. 02-1305

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAREY D. EBERT, TRUSTEE FOR GRAVITY, INC., AND MARK H. DICKSON,
Petitioners,

v.

MICROSOFT CORPORATION, COMPAQ COMPUTER CORPORATION, DELL COMPUTER CORPORATION, AND PB ELECTRONICS, INC.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Dell Computer Corporation, Compaq Computer Corporation and PB Electronics, Inc. state as follows:

Dell Computer Corporation has no corporate parents, and no publicly held company owns 10 percent or more of Dell Computer Corporation's stock.

Compaq Computer Corporation is wholly owned by Hewlett-Packard Company, a publicly traded company. No publicly held company owns more than 10 percent of Hewlett-Packard's stock.

As of March 20, 2003, NEC Corporation of Japan is the corporate parent of PB Electronics, Inc. and owns a majority of the stock of PB Electronics. Approximately 12 percent of the stock of PB Electronics is owned by subsidiaries of Group Bull of France.

TABLE OF CONTENTS

Page

STATEMENT 1

Government and Consumer Class Action Antitrust Claims Filed Against Microsoft. 2

District Court Proceedings 6

The Fourth Circuit's Affirmance 7

REASONS FOR DENYING THE PETITION 9

I. THE FOURTH CIRCUIT'S CONCLUSION THAT PETITIONERS FAILED TO ALLEGE ONE OF THE NECESSARY ELEMENTS OF THEIR ANTITRUST CLAIM IS CONSISTENT WITH THIS COURT'S PRECEDENT AND FEDERAL NOTICE PLEADING RULES. 10

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR EXPLORING THE REQUIREMENTS FOR "HUB AND SPOKE" ANTITRUST CONSPIRACIES. 16

III. THE JUDGMENT BELOW DOES NOT CONFLICT WITH PRECEDENT FROM OTHER CIRCUITS AND IS CONSISTENT WITH THIS COURT'S INSTRUCTIONS ON THE *ILLINOIS BRICK* DOCTRINE 20

A. The Judgment Does Not Conflict With Other Circuits' Precedent. 21

B. The Judgment Is Consistent with this Court's *Illinois Brick* Precedent. 23

1. Petitioners Are Indirect Purchasers of Software. 23

2. There Are Overcharge Tracing Complexities....24

CONCLUSION....25

TABLE OF AUTHORITIES

CASES Page

49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463 (9th Cir. 1986) 19

Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984) 21,22

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 11, 15

In re Beef Industrial Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979) 19

Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918) 11

Digital Equipment Corp. v. UNIQ Digital Technologies Inc., 73 F.3d 756 (7th Cir. 1996) 11, 14

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 11

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972) 16, 17

Elkins v. Microsoft Corp., 817 A.2d 9 (Vt. 2002) 4

In re Florida Microsoft Antitrust Litigation, No. 99-27340, 2002 WL 31423620 (Fla. Cir. Ct. Aug. 26, 2002) 4

Howe v. Microsoft Corp., 656 N.W.2d 285 (N.D. 2003) 4

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ..... *passim*

TABLE OF AUTHORITIES - continued

Page

Impro Products, Inc. v. Herrick, 715 F.2d 1267 (8th Cir. 1983) 16, 17

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) 20

Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990) 21, 24

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 18, 19

Lowell v. American Cyanamid Co., 177 F.3d 1228 (11th Cir. 1999) 21, 22

Michigan v. Long, 463 U.S. 1032 (1983) 18

In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702 (D. Md. 2001), *supplemented by*, No. MDL-1332, 2001 WL 137254 (D. Md. Feb. 15, 2001) 3, 4

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 18

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) 11

Paper Systems, Inc. v. Nippon Paper Industries Co., 281 F.3d 629 (7th Cir. 2002) 21, 22

In re South Dakota Microsoft Antitrust Litigation, 657 N.W.2d 668 (S.D. 2003) 4

State Oil Co. v. Khan, 522 U.S. 3 (1997) 11

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 13

TABLE OF AUTHORITIES - continued

Page

United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) 3

United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) 7

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001) 2, 3, 11

United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997) 22

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 13

RULES

Fed. R. Civ. P. 8(a) 13

MISCELLANEOUS

6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 19

STATEMENT

This case is one of over 140 consumer class actions filed in the wake of the government's monopolization case against Microsoft Corporation. But it is the only case in which three original equipment manufacturers ("OEMs") — Respondents Dell, Compaq and PB Electronics (formerly known as Packard Bell NEC) — were named as alleged co-conspirators with Microsoft. Because these OEMs, like their many competitors making personal computers ("PCs"), obtained essential operating system software from Microsoft for installation on their products, they have been identified in other cases as being among the victims of Microsoft's monopolization. Yet Petitioners claimed that the three OEMs are wrongdoers that agreed with Microsoft to promote an anti-competitive scheme designed to insure that Microsoft would continue to be able to extract monopoly profits as the supplier of an input needed by all OEMs.

The only conduct of the Respondent OEMs that is alleged to have been anti-competitive was their acceptance of restrictions in software license agreements that Petitioners acknowledge were also accepted by every one of their OEM competitors. Petitioners claimed that those restrictions indirectly assisted Microsoft in preserving its monopoly over operating system software; that monopoly, in turn, was alleged to have given Microsoft a monopoly position in applications software. But Petitioners never alleged that the license agreement provisions at issue were *per se* illegal or that Dell, Compaq, and PB possessed a sufficient share of the PC market that their agreements alone — individually or collectively — could have affected competition in the software market at all. Instead, they relied on the purported impact that *industry-wide* acceptance of those licensing terms had on Microsoft's ability to maintain and promote its

alleged monopoly. The Fourth Circuit correctly rejected Petitioners' effort to hold three OEMs liable, as co-conspirators with Microsoft, for the license agreements of all the OEMs and a whole range of additional conduct by Microsoft that did not involve the OEMs at all.

In any event, Petitioners' novel conspiracy claims also constituted an improper attempt to sidestep the direct purchaser requirement that this Court established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). That rule was implicated here because Petitioners did not purchase anything directly from Microsoft. Their theory was that they were injured when the OEMs paid an allegedly inflated price to license Microsoft software and some or all of that surcharge was passed through to Petitioners as part of what they paid for PCs. Petitioners sought recognition of a broad "co-conspirator" exception to *Illinois Brick*, claiming that, merely because they were direct purchasers from one of the alleged conspirators, *Illinois Brick* did not apply. But any such exception, the Fourth Circuit correctly concluded, has been limited to cases involving allegations of price-fixing — which Petitioners do not allege here.

Government and Consumer Class Action Antitrust Claims Filed Against Microsoft

In 1998, the federal government and nineteen states filed antitrust complaints against Microsoft in the United States District Court for the District of Columbia. *See United States v. Microsoft Corp. ("Microsoft II")*, 253 F.3d 34, 45-48 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001). In that case, the governmental plaintiffs successfully argued that Microsoft used its license agreements to impose restrictions on all OEMs, such as preventing them from removing Internet Explorer icons from their PCs and modifying the

initial desktop boot-up sequence. *Microsoft II*, 253 F.3d at 60-63. Their theory was that Microsoft's imposition of these restrictions upon OEMs had the direct effect of discouraging use of the Netscape Internet browser and the indirect, long-term effect of protecting Microsoft's operating system monopoly in violation of section 2 of the Sherman Act. Because installing Windows on PCs was a commercial necessity for the OEMs, *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 24, ¶¶ 54-55 (D.D.C. 1999), the Respondent OEMs, like all their competitors, accepted these restrictions even though they "impose[d] significant costs upon the OEMs," "prevented" OEMs from diversifying their products, and caused "dissatisfaction" among OEMs. *Microsoft II*, 253 F.3d at 62. [1]

United States v. Microsoft led to a long series of consumer class actions, sixty of which the multidistrict litigation panel consolidated in the United States District Court for the District of Maryland. *See In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 704 (D. Md. 2001). This led to the filing of a new consolidated class action complaint on behalf of PC consumers against Microsoft alone, alleging that Microsoft violated federal antitrust laws by engaging in exclusionary, predatory, and/or anti-competitive acts. The "consolidated plaintiffs" sought both injunctive relief and damages for alleged overcharges on certain Microsoft software. The Maryland district court

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[1] A substantial portion of the conduct challenged in *United States v. Microsoft* did not involve the OEMs — *i.e.*, Microsoft's dealings with Netscape and its arrangements with Internet service and content providers. Nonetheless, those aspects of the Government's case were included in Petitioners' complaint and alleged to be part of the over-arching conspiracy for which Petitioners seek to hold each Respondent OEM fully liable.

dismissed their federal damages claims under *Illinois Brick* because consumers are not "direct purchasers" from Microsoft. *See id.* at 708-13. Some pendent state-law damages claims on behalf of consumers survived, and more recently the same consolidated counsel have filed a separate class action on behalf of direct purchaser OEMs.

Various consumer class actions are also pending against Microsoft in state courts under state antitrust laws. The largest was filed in California on behalf of a class of consumers who purchased PCs with Microsoft operating system, word-processing, and spreadsheet software.[2] *See Microsoft I-V Cases,* No. CJP-00-04106 (Cal. Super. Ct.); *see also Elkins v. Microsoft Corp.*, 817 A.2d 9 (Vt. 2002); *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. 2003); *In re South Dakota Microsoft Antitrust Litigation,* 657 N.W.2d 668 (S.D. 2003); *In re Florida Microsoft Antitrust Litigation*, No. 99-27340, 2002 WL 31423620, at *3, ¶ 9 (Fla. Cir. Ct. Aug. 26, 2002) (listing additional class actions in other states).

Petitioners are the only plaintiffs in *any* of these cases who have sought to hold OEMs liable as co-conspirators with Microsoft. In essence, Petitioners alleged that the three OEM Respondents, admittedly vigorous competitors in the sale of personal computers, entered into a conspiracy with Microsoft to preserve Microsoft's alleged monopolies in the sale of operating system, word processing, and spreadsheet software in violation of Sherman Act (15 U.S.C.) §§ 1 & 2. Petitioners did not allege that the OEMs develop or manufacture software in the relevant markets. Nor did they

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[2] Because California does not follow *Illinois Brick*, the consumers could seek damages from Microsoft even though they were not direct purchasers.

allege that Microsoft and the OEM Respondents agreed to set prices for software or PCs, or that the OEMs ever agreed to obtain software exclusively from Microsoft. Pet. App. 3a. Instead, Petitioners argued that Microsoft's ability to impose the challenged restrictions on the OEM Respondents and the rest of the OEMs in the PC market promoted Microsoft's monopoly share in the licensing of operating system, word processing, and spreadsheet software, which allowed Microsoft to charge OEMs monopoly prices for that software. Petitioners further claimed that the OEMs passed on some or all of those excess prices when they loaded the software on PCs sold to consumers.

The sole facts alleged to support the claimed conspiracies were the license agreements between Microsoft and the Respondent OEMs. But Petitioners admitted that *all* OEMs, not just the three defendants, agreed to the same restrictions in their license agreements. Pet. App. 18a. They did not dispute that the Respondent OEMs independently negotiated their respective license agreements with Microsoft, and did not allege that the OEMs even knew the specific terms contained in the confidential agreements accepted by other members of the purported conspiracy. Instead, Petitioners distinguished the Respondents merely as having allegedly accepted Microsoft's licensing terms with greater alacrity than other OEMs, in exchange for discounted prices and other benefits. *See id.*

Petitioners also conceded that the PC market in which the OEMs operate is "fiercely competitive." Pet. App. 17a. They did not allege that the Respondent OEMs — combined or individually — have enough market power in the PC market to foreclose efforts by competing software suppliers to obtain access to that market. *Id.*

District Court Proceedings

The U.S. District Court for the District of Maryland (Motz, J.) dismissed Petitioners' first amended complaint on January 12, 2001. It held that Petitioners failed to allege "any cognizable conspiracy." Pet. App. 55a. That decision rested on several related deficiencies. First, Petitioners had failed to allege a sufficient basis for a finding that the OEMs acted with a specific intent to preserve Microsoft's market share — which is a requirement for a section 2 conspiracy to monopolize and which the district court also believed should be required when the same type of conspiracy is asserted as a violation of section 1. *Id.* at 48a-51a. Second, Petitioners had failed to allege that the OEM defendants had sufficient "market power" to affect competition. *Id.* at 53a. Third, Petitioners' allegations did not provide a basis for concluding that the OEMs formed a single conspiracy with Microsoft and one another, rather than merely acting "in parallel." *Id.* at 54a. The district court initially declined to reach the issue of whether *Illinois Brick* also barred Petitioners' claims. *Id.*

Petitioners sought leave to file a second amended complaint, in which they alleged, in the alternative, two separate, bilateral conspiracies between Dell and Microsoft and Compaq and Microsoft. (Petitioners did not name PB as a defendant in this second amended complaint.) The factual allegations were otherwise virtually identical to those in the first amended complaint and suffered from the same legal deficiencies; in particular, Petitioners again failed to allege that Dell or Compaq possessed market power in the PC market. Moreover, Petitioners' primary additional allegation — namely, that the conspiracies were "coerced" — had been previously considered and rejected by the district court. Pet. App. 52a n.6.

Finding that Petitioners' proposed changes were "only cosmetic," Pet. App. 59a, the court denied Petitioners' motion for leave to amend "on the ground of futility." *Id.* at 58a. It again relied on the fact that Petitioners had not alleged that Dell or Compaq had the necessary market power to suppress competition. *Id.*; *see also United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 51-54 (D.D.C. 2000) (dismissing the government's section 1 exclusive dealing claims relating to Microsoft and Compaq on the ground that any such arrangement did not foreclose access to a sufficient portion of the OEM market).[3]

The district court also concluded that *Illinois Brick*'s indirect purchaser rule bars Petitioners' damages claims. Pet. App. 60a-64a. Petitioners' overcharge theory falls squarely within the *Illinois Brick* paradigm and any price-tracing analysis based thereon is "self-evidently complex." *Id.* at 63a. In addition, it found a "more fundamental fallacy in plaintiffs' position" — namely, that Petitioners' argument "would provide a means for circumventing the *Illinois Brick* rule in any vertical conspiracy case in which a plaintiff could meet the relatively low pleading threshold of alleging that a distributor had been coerced into entering into a conspiracy with a powerful manufacturer to maintain the latter's monopoly." *Id.*

The Fourth Circuit's Affirmance

The Fourth Circuit affirmed the district court's ruling, by a vote of 2-1. The majority opinion discussed the law

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[3] The district court also concluded that Petitioners had again failed to include sufficient allegations that Dell or Compaq entered into contracts with Microsoft with specific intent to assist Microsoft in carrying out its alleged monopolistic goals. Pet. App. 59a-60a.

governing "hub and spoke" conspiracies and concluded that the single, four-party conspiracy first alleged by Petitioners was deficient because they failed to allege the requisite "rim" to connect the OEM Respondents as members of a common scheme. *See* Pet. App. 9a-11a. The court also noted that Petitioners had not argued that there was a sufficient "overlap of key actors, methods, and goals" to form a single conspiracy under the standards applied in criminal conspiracy cases. *Id.* at 10a n.12.

The court then held that Petitioners' bilateral and multilateral conspiracy claims were properly dismissed for the additional reason that Petitioners made no claim that the defendant OEMs had enough market power to injure competition. Pet. App. 11a n.13. Because Petitioners did not allege that the challenged license restrictions constituted a *per se* violation of the antitrust laws, the license agreements were subject to "the full rule of reason analysis." *Id.* at 14a. Accordingly, Petitioners' claims were deficient as a matter of law unless the challenged conduct has an "anti-competitive effect." *Id.* at 14a-15a. Because Gravity conceded that the PC market is "fiercely competitive" and that neither Compaq nor Dell has power in that market, *id.* at 17a, and further failed to allege any facts regarding Compaq and Dell's market share, the court concluded that Petitioners would be "unable, as a matter of law, to demonstrate that Microsoft's agreements with Compaq and Dell, when considered individually, are capable of causing any substantial harm to competition." *Id.* at 18a.

Finally, the Fourth Circuit agreed with the district court that the *Illinois Brick* doctrine barred Petitioners' monetary claims. *Id.* at 27a-32a. The court reviewed the decisions of other circuits applying a "co-conspirator" exception to the *Illinois Brick* rule, and determined that any such exception

would be limited to price-fixing conspiracies like those present in the cases reviewed. *Id.* at 30a. In those cases, no "pass through" problem exists, because the conspirators have set a price that the end-user pays. *Id.* Petitioners did not allege that the OEMs and Microsoft collusively set an anti-competitive price, but instead sought to recover damages for an alleged Microsoft overcharge that may have been passed on by OEMs to consumers. Accordingly, the "pass-through" problems identified in *Illinois Brick* remain, and it would not be appropriate to apply a "co-conspirator" exception to the *Illinois Brick* rule.

REASONS FOR DENYING THE PETITION

Petitioners offer no persuasive reason why the Court should review any of the three questions presented. First, Petitioners' claim that the court below imposed a heightened pleading standard is incorrect and is simply an effort to paper over a glaring flaw in their antitrust theory. Second, although the Fourth Circuit expressed some disagreement with language in two older cases from other circuits involving "hub and spoke" conspiracies, there is no true circuit conflict and this case provides a poor vehicle for exploring the limits of conspiracy law. Finally, the Fourth Circuit's ruling on the *Illinois Brick* issue is fully consistent with this Court's analysis and does not conflict with any decision of another circuit. *Illinois Brick* bars an indirect purchaser suit seeking damages based on higher prices passed through by manufacturers paying monopoly prices to their component supplier.

I. THE FOURTH CIRCUIT'S CONCLUSION THAT PETITIONERS FAILED TO ALLEGE ONE OF THE NECESSARY ELEMENTS OF THEIR ANTITRUST CLAIM IS CONSISTENT WITH THIS COURT'S PRECEDENT AND FEDERAL NOTICE PLEADING RULES.

Petitioners' assertion that the panel majority erroneously imposed a "heightened pleading" standard, and thereby contravened this Court's precedent regarding notice pleading, distorts both the Fourth Circuit's opinion and the pleading standards of the Federal Rules of Civil Procedure. The Fourth Circuit properly recognized that Petitioners' claims, founded as they are on the rule of reason, required an assertion that the conduct of the alleged conspirators caused an injury to competition in the relevant markets. At the pleading stage, particularly given that Petitioners conceded that the PC market was "highly competitive," Petitioners were required to address this essential element in more than conclusory fashion. They needed to allege that the three Respondent OEMs had a sufficient market share, or market power, in the PC market such that their acceptance of various specified restrictions in their license agreements with Microsoft could have substantially affected the ability of software companies to distribute their software through the OEM channel. Petitioners' failure to do so, despite multiple opportunities in the district court, renders all of the conspiracy theories articulated in the complaints defective, even under minimal notice pleading standards.

As the panel majority discussed in detail, the essence of Petitioners' claim is that the license agreements between Microsoft and the defendant OEMs caused the OEMs to favor Microsoft products in various ways, thereby reducing demand for, and/or access to, products developed by

alternative suppliers of operating system software, browser software and applications software. *See* Pet. App. 2a-5a. Petitioners do not contend that the OEMs' conduct is *per se* illegal under section 1. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (describing practices with "such predictable and pernicious anti-competitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se"); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). Accordingly, their antitrust claim is legally cognizable only if the alleged co-conspirators had sufficient market share and market power that *their* agreement to the licensing restrictions, by itself, would substantially affect the power of software companies to obtain access to the market for licensing software to OEMs. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (concluding that plaintiffs bringing group boycott claim must allege harm to competition); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992); *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918). But Petitioners never made that claim. To the contrary, they admitted that the OEM marketplace is "fiercely competitive" with a multitude of competitors. Pet. App. 17a.[4]

Thus, Petitioners' argument has nothing to do with pleading standards and everything to do with the scope of potential liability under the Sherman Act. Their real claim is breathtaking: it is that each Respondent OEM became a co-

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[4] *See also Microsoft II*, 253 F.3d at 61 (describing personal computer market as "highly competitive"); *Digital Equip. Corp. v. UNIQ Digital Techs. Inc.*, 73 F.3d 756, 761 (7th Cir. 1996) (same). In fact, Petitioners acknowledged that one of the Respondent OEMs, PB Electronics, exited the PC business and ceased operation as of December 1999.

conspirator with Microsoft when it accepted the restrictions on license agreements that Microsoft demanded, *and thereby became liable for everything Microsoft did industry-wide*, exercising its market power in the *software* market. *See* Pet. at 16-17 (arguing that Microsoft's power in the software market sufficed to establish the anti-competitive effects caused by the alleged conspiracies).[5] The logic of their position would mean that any of the multitude of OEMs, no matter how small, could also be subject to massive treble-damage liability — since all concededly accepted the same restrictions in their license agreements.

There is no reason to review the Fourth Circuit's rejection of that radical position. The conclusion of the court below that "it could not consider the cumulative harm of Microsoft's agreements with all OEMs," Pet. App. 22a, was well grounded in antitrust doctrine. Indeed, rather than attempting to show why it would make sense to hold each customer of a monopolist liable for everything that the monopolist does in relation to third parties, Petitioners simply attempt to avoid the issue by claiming that the Fourth

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[5]Gravity argues that because Microsoft has monopoly power in the software markets, the alleged conspiracy had sufficient market power to impact that market. *See* Pet. at 16. But the alleged injury to Microsoft's competitors stems from their purported inability to distribute their software through the OEM channel, and Gravity's theory of competitive harm is thus one of foreclosure from the PC market. Microsoft does not even participate in that market. Thus, the alleged conspiracy could only have an anti-competitive effect if the Respondent OEMs individually and/or collectively have sufficient control of the computer market that their license agreements alone could have foreclosed access by would-be software suppliers. Petitioners have never alleged that to be true, nor could they.

Circuit erred in applying new pleading standards. That is simply not true.

To the contrary, even in our system of notice pleading, Petitioners had an obligation to provide a "short and plain statement of the claim showing that the pleader is *entitled to relief*." Fed. R. Civ. P. 8(a) (emphasis added). Nothing in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), altered that rule. One of the required elements of Petitioners' case is a showing that the license agreements of the Respondent OEMs could have affected competition by significantly barring access to the PC market by competing software suppliers. They failed to allege any mechanism by which the conduct of three OEMs, by itself, could have produced that result. They did not go beyond merely conclusory allegations on this key point, and thus failed to offer a statement showing their entitlement to relief.

Nor is there anything in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), *see* Pet. at 18-19, that conflicts with the Fourth Circuit's ruling. While *Zenith* held that a conspiracy need only be a "material cause of the injury," 395 U.S. at 114 n.9, the Fourth Circuit correctly held that "[w]ithout an allegation of market share or market power," Petitioners still have failed to state a claim entitling Petitioners to any relief. Pet. App. 19a n.19. *Zenith Radio* in no way justifies holding the Respondent OEMs liable for anti-competitive effects that arose, if at all, only because the entire OEM industry agreed to the same restrictions.

Petitioners do attempt to locate some language in their complaints that differentiates the *Respondent* OEMs (although they deliberately confuse Hewlett-Packard with PB's predecessor, Packard Bell) from all of their competitors, attributing some special significance to the

dealings of Microsoft with those three customers. They point to allegations that Microsoft gave Compaq, Dell and PB (but not PB's predecessor, Packard Bell) discounts and other benefits. Pet. at 18. But those alleged facts, without some identification of a mechanism by which these three companies individually or collectively could affect competition by accepting restrictions on their use of software licensed by Microsoft, do not establish anti-competitive effects. At most, they show that the Respondent OEMs cut the best deal possible while accepting — as all of their competitors ultimately did as well — the restrictions that Microsoft demanded of everyone. Indeed, given the competitive nature of the PC market, if the OEMs "did not negotiate for favorable prices with Microsoft, they ran the substantial risk of being undersold by their competitors." Pet. App. 53a.[6]

Petitioners also argue that they should have been allowed to get past the pleading stage and look in discovery for evidence of actual anti-competitive effects in the marketplace. Pet. at 17-18. But that is just another way of repeating Petitioners' fallacious argument that the Respondent OEMs could properly be held liable for

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[6] Petitioners' additional allegation that the OEM Respondents were "among the largest players in the PC hardware market," Pet. App. 39a, does not cure their failure to articulate a basis for causing injury to competition. Even assuming that such a general statement could support an inference of anti-competitive effects in some hypothetical case, Petitioners' acknowledgement that the PC market is highly competitive prevents the statement from serving that purpose here. In such a market, with dozens of significant competitors and hundreds of participants, *see Digital Equipment Corp.*, 73 F.3d at 761, even the 8 or 9 "largest" players may not cumulatively possess a sufficient market share to cause harm to competition. Pet. App. 21a n.20.

everything Microsoft ever did. Discovery certainly would not provide any basis for separating out market effects caused by Microsoft's dealings with the *Respondent* OEMs, distinct from the effects of its consistent dealings with the entire industry.

Finally, Petitioners' claim that consumers will suffer if this kind of conspiracy case is not allowed rings false given the multitude of suits pending against Microsoft alone. If anything, it is Petitioners' theory that risks harm to consumers and the competitive process, because subjecting companies to antitrust liability for conduct like that alleged here would make it impossible for companies to enter into any commercial contract with a dominant or monopolist supplier of an essential input without facing draconian antitrust liability. And inferring membership in an anti-competitive conspiracy from a company's ability to obtain lower prices or other favorable terms from a manufacturer would seriously deter the companies from bargaining for better prices, thereby injuring consumers. *See* Pet. App. 53a n.7 (noting that the alleged discounts the OEMs received would cause lower prices and thereby *benefit* consumers); *see also Atlantic Richfield*, 495 U.S. at 340 (noting that "[l]ow prices benefit consumers regardless of how those prices are set"). Companies like the Respondent OEMs would be forced to choose between two options: (1) refuse to distribute the monopolist's products notwithstanding consumer demand for those products, or (2) face mammoth antitrust claims. Neither result would benefit consumers.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR EXPLORING THE REQUIREMENTS FOR "HUB AND SPOKE" ANTITRUST CONSPIRACIES.

Petitioners also ask the Court to review the Fourth Circuit's handling of their "hub and spoke" conspiracy theory. The Court should decline that invitation. Petitioners' critiques of the Fourth Circuit on this issue are largely academic, since they would not affect the outcome, and are in any event misplaced.

The essence of Petitioners' single conspiracy claim was the allegation that each Respondent OEM accepted restrictive provisions in its license agreements with Microsoft, that Microsoft had anti-competitive reasons for demanding those provisions, and that the Respondent OEMs received some benefits for acquiescing to Microsoft's demands.[7] *See* Pet. at 12. Thus, Microsoft was allegedly the "hub" of the purported conspiracy, and its agreements with each OEM created the conspiracy's "spokes." Petitioners argue that these allegations are sufficient to support their conspiracy claim because the OEMs need not have met or agreed with one another to further the conspiracy, and that the Fourth Circuit's rejection of this "hub and spoke" conspiracy theory conflicts with the Sixth and Eighth Circuits' interpretation of this Court's conspiracy precedent in *Impro Products, Inc. v. Herrick*, 715 F.2d 1267 (8th Cir. 1983), and *Elder-Beerman Stores Corp. v. Federated*

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[7] Although Petitioners' characterization of their conspiracy claim suggests that the Respondent OEMs knew of Microsoft's anti-competitive intentions, and were aware that Microsoft likely obtained other OEMs' consent to the disputed licensing agreement terms, the complaint contains no such allegations of knowledge.

Department Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972). *See* Pet. at 12-16.

It is true that the Fourth Circuit expressed reservations about the Sixth and Eighth Circuits' decisions suggesting that they might allow some "hub and spoke" conspiracy claims. But there is no actual circuit conflict. Both *Impro* and *Elder-Beerman rejected* the hub and spoke claims at issue in those cases, applying reasoning that would be equally applicable here.

Indeed, the district court in this case itself applied the very test from *Impro Products* that Petitioners prefer, and it determined that Petitioners' allegations were not sufficient to establish a "hub and spoke" conspiracy claim under that test. As the district court persuasively reasoned:

> [A]t the least plaintiffs "must demonstrate that the defendants shared a 'unity of purpose or a common design and understanding, or a meeting of the minds' to engage in the conduct prohibited by the Sherman Act." *Impro Prods. Inc. v. Herrick*, 715 F.2d 1267, 1273 (8th Cir. 1982). Here, all that plaintiffs allege to meet this element is that the OEMs were generally aware that Microsoft was demanding similar restrictive agreements in all of their negotiations and that OEMs who acquiesced more quickly to Microsoft's demands were receiving more favorable terms. Again, this knowledge on the part of the OEMs would not establish that they "shared a unity of purpose" or that "their minds had met" to maintain Microsoft's monopolies. Likewise, the fact that, armed with that knowledge, the OEM defendants were each independently able to negotiate relatively favorable terms with Microsoft establishes no

> "common design and understanding" between them. It shows nothing more than that they acted competitively vis-a-vis one another.

Pet. App. 54a-55a. Accordingly, there is no reason for this Court to intervene to resolve the disagreement between the Fourth Circuit and the Sixth and Eighth Circuits over the exact standards that apply. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve circuit disagreement where Petitioners' claim would fail even under the most lenient circuit's approach); *see generally Michigan v. Long*, 463 U.S. 1032, 1071 (1983) ("If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere.").

That Petitioners' claim would be subject to dismissal — regardless of whether "hub and spoke" arrangements may sometimes constitute actionable antitrust conspiracies — makes perfect sense. In any conspiracy case, the plaintiff must show that the defendants each made a "conscious commitment" to an unlawful scheme. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Especially in a hub and spoke context, that requirement should be understood to limit conspiracy claims to situations where each "spoke" had reason to know that its actions were unlawful. It is one thing to allow a hub and spoke claim in a case involving *per se* illegal price fixing, and quite another to do so here where the OEMs were accused of agreeing to restrictions on their operations that were not inherently problematic and were only claimed to have had long-term and indirect anti-competitive effects caused by the collective conduct of all OEMs.

If allegations like Petitioners' were enough to establish a single conspiracy, all companies operating in a competitive

market, seeking to purchase a commercially necessary input from a source with monopoly power, would expose themselves to staggering liability just by purchasing that input on the only terms available. Indeed as noted above, under Petitioners' theory, *all* OEMs in the industry would be guilty of entering into a conspiracy with Microsoft and all their competitors, simply because they accepted the licensing restrictions. As the district court concluded, to allow such a conspiracy claim "would run afoul of the 'fundamental antitrust concept that the alleged sins of sellers should not be visited on buyers because of the risk of chilling competition,'" Pet. App. 55a, and is directly contrary to the recognition of both courts and commentators that ordinary commercial transactions do not become actionable antitrust violations merely because a company conducts those transactions with an alleged monopolist. *See, e.g.*, *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1161 (5th Cir. 1979); *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986); 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1408b (2d ed. 2003).

Finally, the fact that this case was dismissed at the pleading stage, and the resulting lack of factual development regarding any alleged conspiracies, provide an additional basis for denying certiorari. The lack of factual information would impede the Court's ability to establish and apply rules regarding the scope of any "hub and spoke" conspiracy theories that may be recognized under antitrust law. The Court could articulate broad principles of law, but would be unable to apply those principles to the specifics of this alleged conspiracy. Such an analysis would provide little guidance for lower courts, and the precedential value of such an opinion would be limited. *See generally Klehr*, 521 U.S. at 192-93 (declining to resolve circuit disagreement where

facts of case "do not force focused argument" about the issue for which Petitioners sought review). A case that has advanced beyond the pleading and discovery stage would therefore be a far more appropriate vehicle for exploring the viability of "hub and spoke" antitrust conspiracy claims. *See generally Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966) (deferring review of dispute concerning alleged discriminatory effects that were "largely matters of conjecture" to a future case that "clearly presents" the issue).

III. THE JUDGMENT BELOW DOES NOT CONFLICT WITH PRECEDENT FROM OTHER CIRCUITS AND IS CONSISTENT WITH THIS COURT'S INSTRUCTIONS ON THE *ILLINOIS BRICK* DOCTRINE

In their complaints, Petitioners asserted that the OEM "conspiracy" with Microsoft — whether multi-lateral or bi-lateral — caused antitrust injury by raising the prices they paid to the OEMs due to a pass through of excess charges paid by the OEMs to Microsoft. *See* Pet. App. 31a. That alleged injury was not claimed to be caused by a resale price maintenance scheme, nor by any horizontal price fixing by the OEM Respondents. Rather, the injury was allegedly the result of a vertical conspiracy by which OEMs agreed to maintain the monopoly power of Microsoft, their supplier of a component integrated by OEMs into computer products, resulting in payment of higher prices for that component. That kind of antitrust theory, the Fourth Circuit correctly concluded, is "materially indistinguishable from the claim under consideration in *Illinois Brick*." *Id.*

The opinion below fully considered precedent from other circuit courts of appeals recognizing a "co-conspirator exception" to *Illinois Brick* for a price-fixing conspiracy.

The Fourth Circuit determined that those cases were simply not relevant, because no price-fixing conspiracy was alleged by Petitioners. Pet. App. 30a-31a. Further, the court concluded that the *Illinois Brick* doctrine applied here because there was a danger of duplicative recovery and the Gravity complaint required the "complex task of price-tracing … the exact analysis that *Illinois Brick* forbids." *Id.* at 31a-32a. These conclusions were both correct and fully consistent with this Court's previous instruction that lower courts should not "'carve out exceptions to the [direct purchaser] rule.'" *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990) (quoting *Illinois Brick*, 431 U.S. at 744) (internal quotation marks & citation omitted).

A. The Judgment Does Not Conflict With Other Circuits' Precedent.

Petitioners assert that the Seventh, Ninth and Eleventh Circuits have each held that *Illinois Brick* does not preclude claims against vertical co-conspirators, citing *Paper Systems, Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629, 631 (7th Cir. 2002); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984); and *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999). Pet. at 21-22. But the Fourth Circuit properly interpreted these opinions as standing only for the proposition that "*Illinois Brick* is inapplicable to a particular type of conspiracy — price-fixing conspiracies." Pet. App. 30a. The majority observed that it need not resolve whether the Fourth Circuit would recognize a similar co-conspirator exception to *Illinois Brick* for price fixing conspiracies because no such conspiracy was alleged by Petitioners. *Id.* at 30a-31a.

There is thus no conflict among the circuits shown here. Rather, the Court's opinion below properly construed the

precedent and distinguished Petitioners' case from those at issue in the earlier cases. *Lowell* and *Shamrock* are resale price maintenance conspiracy cases, where a supplier dictates to downstream distributors prices at which the product will be sold. *Lowell,* 177 F.3d at 1228; *Shamrock,* 729 F.2d at 1211. Both opinions distinguish resale price fixing cases from "pass-on" cases which remain fully subject to the *Illinois Brick* rule. *Lowell*, 177 F.3d at 1230 & n.4; *Shamrock*, 729 F.2d at 1212-14.

Nippon Paper involved a horizontal agreement among paper manufacturers to fix prices. Some of the manufacturers did not sell to plaintiffs but, instead, relied exclusively on trading firms to distribute their products. These trading firms were enlisted to join the horizontal price fixing conspiracy by agreeing to sell at the price set by the five manufacturers. 281 F.3d at 631-32. The Seventh Circuit decision in *Nippon Paper* holds that *Illinois Brick* does not preclude a damage claim by an entity purchasing from the trading companies at a price fixed by the conspirators. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 2 (1st Cir. 1997) (trading houses agreed to sell at "specified prices") (cited by *Nippon Paper*, 281 F.3d at 631). As the majority below noted, Petitioners did not allege a resale price maintenance theory involving software products, or a horizontal conspiracy to fix the price of software or computers. Rather, they alleged that Microsoft, a monopolist, overcharged the OEMs and that the OEMs, in turn, passed on some or all of that overcharge to customers. Pet. App. 30a-31a. That is not the kind of antitrust theory involved in the trilogy of cases relied upon by Petitioners, and the Panel correctly distinguished that precedent.

B. The Judgment Is Consistent with this Court's *Illinois Brick* Precedent.

Illinois Brick is grounded in two principal rationales: (a) fear of multiple recovery if both direct and indirect purchasers are permitted to sue a manufacturer; and (b) price-tracing difficulties, particularly where a supplier's component is integrated into products by direct purchasers who then sell the system to end-users. As the Court below noted, both of those concerns are implicated in Petitioners' claims.

1. Petitioners Are Indirect Purchasers of Software.

Petitioners did not buy a Microsoft operating system or Microsoft applications programs from the Respondent OEMs. Rather, they purchased computer systems, which integrated a variety of components: monitors, keyboards, memory chips, processors, operating software, and applications software. The Respondent OEMs are, by Petitioners' own admission, part of a highly competitive industry with significant price competition. Pet. App. 17a-18a. If, as is alleged, Microsoft was able to extract anti-competitive higher prices from the OEMs, it is the OEMs as direct purchasers who have the authority to sue. *Illinois Brick,* 431 U.S. at 745-46. Petitioners, in turn, are only "indirect" purchasers of software from Microsoft and direct purchasers of computer systems from the OEMs. As in *Illinois Brick*, the component (brick) was integrated into a finished product (building). As in *Illinois Brick*, plaintiffs who purchase the final product are indirect purchasers of the component and are not entitled to sue.

Here, the named Respondent OEMs — Dell, PB, and Compaq — have thus far not elected to sue Microsoft,

although they are members of some of the proposed plaintiff classes. *Illinois Brick* recognized that direct purchasers such as the OEMs may refrain from bringing a treble damages suit but that, despite that fact, the antitrust laws were better served by limiting the right to sue to direct purchasers. 431 U.S. at 746. Petitioners offer no reason to deviate from this Court's long-standing rule.

2. There Are Overcharge Tracing Complexities.

As to the second factor, the Fourth Circuit concluded properly that if the Petitioners' case were to proceed, a trial court "would be required to determine the over-charge, if any, for Microsoft software that was passed on to consumers — the exact analysis that *Illinois Brick* forbids." Pet. App. 31a. Petitioners suggest that this analysis was somehow deficient. Pet. at 25-28. But in fact the decision tracks the rationale of this Court in *Illinois Brick,* where this Court recognized that "the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings." 431 U.S. at 732.

In short, nothing in the Panel decision below warrants this Court's review of the *Illinois Brick* doctrine: there is no conflict among the courts of appeals and the decision is consistent with this Court's *Illinois Brick* analysis. In fact the Fourth Circuit should be commended for following this Court's admonition to refrain from carving out new exceptions to the *Illinois Brick* direct purchaser rule. *UtiliCorp*, 497 U.S. at 216.

CONCLUSION

The petition for a writ of certiorari should be denied.

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